Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

JAMES B. MAYNARD,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether a railroad's locomotive has been put in use, or is being permitted to be used, on the railroad's line for purposes of the Boiler Inspection Act when it has been inspected, repaired and serviced at a maintenance facility and has been released from that facility and delivered to a railroad yard and is being used by employees engaged in or connected with the movement of that engine?

LIST OF PARTIES

The Petitioner is James B. Maynard

The Respondent is Norfolk and Western Railway Company

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OPINIONS IN COURTS BELOW

On January 5, 1994, the United States District Court for the Western District of Virginia, at Abingdon (hereinafter referred to as "District Court") entered an Order and Memorandum Opinion which denied James B. Maynard's (hereinafter "Maynard") Motion for Summary Judgment and granted Norfolk and Western Railway Company's (hereinafter "Norfolk and Western") Motion for Partial Summary Judgment as to Maynard's claim in Count I of the Amended Complaint based upon the Boiler Inspection Act. (App. 1-15)

This case was tried before a jury on January 5, 6, and 7, 1994. On January 7, 1994, the jury returned a verdict for Norfolk and Western on Count I and II of the Amended Complaint. (App. 16-17) On January 10, 1994, the District Court entered judgement in favor of Norfolk and

Western. (App. 18)

On February 8, 1994, the District Court entered an Order which denied Maynard's Motion to Set Aside the Verdict and to Grant a New Trial and ordered that this case be stricken from its docket and thereby entered judgment in favor of Norfolk and Western. (App. 19)

Maynard timely filed and served his Notice of Appeal on February 18, 1994. (App. 20-21) On March 27, 1995, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Order of February 8, 1994 in an unpublished per curiam opinion. (App. 25-30)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Fourth Circuit which was entered on March 27, 1995. This Petition for Writ of Certiorari is timely filed.

RELEVANT STATUTES

45 U.S.C. § 23 of the Boiler Inspection Act provides:

Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.
(As amended June 22, 1988, P. L. 100-342, § 14(2), 102 Stat. 632.)

STATEMENT OF THE CASE

Petitioner, Maynard brought this action by an Amended Complaint containing two counts. Count I alleged violations of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, the Safety Appliance Act, 45 U.S.C. §§ 1-16, and the Boiler Inspection Act, 45 U.S.C. § 23, resulting in injuries that he sustained while employed by the Respondent, Norfolk and Western, at Richlands, Virginia on November 1, 1990. Count II alleged violations of the Federal Employers' Liability Act resulting in injuries during the period from November 2, 1990 to November 13, 1990.

Jurisdiction in the United States District Court for the Western District of Virginia at Abingdon was based on 45 U.S.C. § 56 and 28 U.S.C. § 1331.

On December 3, 1994, Maynard filed a

Motion for Summary Judgment and Brief in Support on the issue of Norfolk and Western's liability in Count I under the Boiler Inspection Act.

Maynard submitted facts in support of his Motion for Summary Judgment which showed that on November 1, 1990, he was employed by Norfolk and Western as a locomotive engineer and, after reporting to work, he went to his assigned engine, Norfolk and Western 3218, and attempted to enter the locomotive cab through the door on the short hood end of the locomotive. When Maynard tried to pull the door open, he injured his left arm. He found that the door was jammed beyond its usual position and was dented. Maynard's supervisor, two carmen, and a flagman inspected the door after Maynard's accident and found that the door would not operate properly. They also

found that the door was jammed, that it was not usable, that the gasket around the door was cracked and badly worn, and that it had to be taken out of service because they were afraid someone would get hurt. Maynard's supervisor agreed that the door was part of the engine.

Maynard argued that there was no testimony or evidence that would indicate that the door to engine 3218 was functioning properly. Maynard further argued that the door was a part and/or an appurtenance of the engine and requested that the District Court grant summary judgment on his Boiler Inspection Act claim because there was no dispute that the defective door caused him injury.

On December 22, 1993, Norfolk and Western filed a Motion for Partial Summary Judgment and Memorandum in Support on the

issue of liability on Count I under the Boiler Inspection Act. Norfolk and Western also asked the District Court to deny Maynard's Motion for Summary Judgment. In its Motion Norfolk and Western first raised the issue of whether engine 3218 was in use or was being permitted to be used in its line at the time of Maynard's injury for purposes of coverage by the Boiler Inspection Act.

Norfolk and Western offered an affidavit stating that:

"it was the duty of an engineer such as Maynard to make a general inspection of his engine before leaving Richlands yard." (App. 24) Based upon this statement, Norfolk and Western argued that because the unit supposedly had to be inspected by Maynard before he left Richlands and because he had not done so before he was

injured, the engine was not "in use" on its line and was therefore excluded from coverage by the Boiler Inspection Act. (App. 37) Norfolk and Western also stated that on the morning of November 1, 1990, its engine was "parked" on the spark track in the yard at Richlands, Virginia and because engine 3218 was not moving interstate or foreign commerce, it was not "in use" on Norfolk and Western's line. (App. 36-37) Norfolk and Western also argued that there was a jury question as to whether the door was unsafe.

On December 30, 1994, Maynard filed his response to Norfolk and Western's Motion for Partial Summary Judgment and submitted additional facts which showed that the spark track at Richlands, Virginia was not a part of a maintenance facility and was not used for service, repair and/or

inspections of engines by car inspectors or carmen. Maynard stated that there were no service or repair facilities in Richlands, Virginia and that engines like the one he was assigned to operate were inspected, repaired and readied for use in Bluefield, West Virginia and were then brought to Richlands, Virginia and other locations for active service. Maynard testified that he was assigned to take his engine to meet a train in Cedar Bluff, Virginia and push that train consisting of engines and empty coal cars over a mountain so that the train crew could deliver the empty coal cars to a mine in Wyatt, West Virginia.

Maynard testified that he entered the engine door to start the engine and had no other engine available for his tour of duty. He turned in ME-60 reports regarding the condition of his engine after the

completion of each trip.

Maynard argued that the Fourth Circuit in Angell v. Chesapeake and Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980), ruled that an engine was "in use" for purposes of the Boiler Inspection Act when it had been "readied" through inspection, servicing and repair at a maintenance facility and "okayed" or released by railroad officials for active service. Maynard argued that his engine had been released from Bluefield, West Virginia and delivered to Richlands, Virginia for use by engineers and as such, it was "in use" or was being permitted to be used on Norfolk and Western's line for purposes of the Boiler Inspection Act. Maynard further argued that Norfolk and Western had failed to provide the District Court with specific facts which showed that the engine door was

not "unsafe". (App. 38-50)

On January 5, 1994, the District Court entered an Order and Memorandum Opinion which granted Norfolk and Western's Motion for Partial Summary Judgment as to Maynard's claim based upon the Boiler Inspection Act, and denied Maynard's Motion for Summary Judgment. (App. 1-15)

On the second day of the trial of this case, January 6, 1994, Maynard noted his objection to the District Court's ruling regarding his Boiler Inspection Act claim. (App. 50-52)

This case was tried before a jury on January 5, 6, and 7, 1994. The evidence at trial was that there were no repair facilities at Richlands, Virginia and that engines were repaired in Bluefield, West Virginia and Roanoke, Virginia. When repairs to engines were complete, train

crews took the engines to Richlands and other locations for active service. (App. 54,63) Maynard described the spark track as a holding track for engines and testified that there were no carmen assigned to do repair work at Richlands. There were no other engines located in Richlands, Virginia when Maynard reported for duty. (App. 63)

Maynard testified that he always reached for the engine door when moving an engine and intended to enter the engine to start the engine, to get the air brakes working and turn the lights on. (App. 64) Maynard described how he was injured when he attempted to open the door. (App. 64-65) He and other railroad employees described the defective condition of the door. (App. 67-76) Testimony showed that the door was taken out of service so that

no one could use it and because it was not working properly. (App. 69-71)

Maynard testified that he filled out an ME-60 form to report the condition of the engine after his tour of duty was completed. He reported the defective condition of the door while he was returning to Richlands. (App. 75) He did not leave the engine when he discovered the defective door because there were no repair facilities or carmen in Richlands and because he had received a signal from the dispatcher to leave the spark track and go to Cedar Bluff to meet the train that he was pushing to Wyatt, West Virginia. (App. 74-75)

Ben Burnette, a Norfolk and Western engineer, testified that he operated engine 3218 on the day before Maynard's accident. Burnette testified that he had difficulty

opening the short hood door and reported the defective condition of the door on an ME-60 form which he turned in after his trip. (App. 53-61)

Maynard's treating physicians testified that the injury to his left arm was caused by his pulling on the defective door.

On January 7, 1994, Maynard renewed his Motion for Summary Judgment on the issue of Norfolk and Western's liability under the Boiler Inspection Act. The District Court denied his motion. (App. 50-52)

On January 7, 1994, the jury returned a verdict for Norfolk and Western on Counts I and II of the Amended Complaint. (App. 16-17) On January 10, 1994, the District Court entered Judgment in favor of Norfolk and Western. (App. 18)

On January 20, 1994, Maynard filed a Motion to Set Aside Verdict and to Grant a New Trial and Brief in Support pursuant to Rule 59 of the Federal Rules of Appellate Procedure. Maynard requested that the District Court reconsider its rulings with respect to the Boiler Inspection Act set aside the jury verdict with respect to Counts I and II of the Complaint and order a new trial whereby Maynard would be allowed to pursue his claim under the Boiler Inspection Act and the Federal Employers' Liability Act.

Maynard relied upon the Fourth Circuit's rulings in Angell and noticed that in Angell, the Fourth Circuit warned against excluding from coverage under the Boiler Inspection Act any activity occurring between servicing and preparing the engine at a maintenance facility up

until the time the engineer takes the controls. Maynard argued that the District Court committed error in excluding him from coverage under the Boiler Inspection Act because he had been injured after the engine had been serviced at a maintenance facility and when he was attempting to take the controls of a "readied" engine. (App. 77-82)

Norfolk and Western filed its Memorandum in Opposition to Maynard's Motion to Set Aside the Verdict on February 8, 1994. (App. 83-86) On February 8, 1994, the District Court denied Maynard's Motion to Set Aside the Verdict and to Grant a New Trial and ordered that this matter be stricken from the docket, thereby entering judgment in favor of Norfolk and Western. (App. 19) Maynard timely filed and served his Notice of Appeal on February

18, 1994. (App. 20-21) Jurisdiction of the United States Court of Appeal for the Fourth Circuit was found in 28 U.S.C. § 1291 and § 1294 and the Federal Rules of Appellate Procedure 3 and 4.

On August 10, 1994, Maynard filed his Brief of Appellant with the United States Court of Appeals for the Fourth Circuit. He argued that the District Court committed a reversible error of law when it ruled that Norfolk and Western's Engine 3218 was not "in use" on Norfolk and Western's line at the time of Maynard's injury and thereby improperly denied his Motion for Summary Judgment and improperly granted Norfolk and Western's Motion for Partial Summary Judgment with respect to Maynard's Boiler Inspection Act claim.

On September 22, 1994, Norfolk and Western filed its Brief of Appellee with

the United States Court of Appeals for the Fourth Circuit.

On October 11, 1994, Maynard filed his Reply Brief with the United States Court of Appeals for the Fourth Circuit.

Following oral argument on February 1, 1995, the United States Court of Appeals for the Fourth Circuit entered judgment in the form of an unpublished per curiam opinion on March 27, 1995. The Fourth Circuit opined that because Maynard had not inspected the locomotive, had not filled out his inspection report, and had not put the locomotive in use, the Boiler Inspection Act had not yet become applicable. The Fourth Circuit did not state how the locomotive had not been put in use. (App. 23-28)

Maynard now brings this Petition for Writ of Certiorari and respectfully

requests that this court review the Fourth Circuit's rulings regarding his Boiler Inspection Act claim.

ARGUMENT

I. Whether a railroad's locomotive has been put in use or is being permitted to be used on the railroad's line for purposes of the Boiler Inspection Act when it has been inspected, repaired and serviced at a maintenance facility and has been released from that facility and delivered to a railroad yard and is being used by employees engaged in or connected with the movement of that engine?

The decision of the United States Court of Appeals for the Fourth Circuit with respect to James B. Maynard's Boiler Inspection Act claim is inconsistent with its prior rulings in Angell v. Chesapeake and Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980) and conflicts with opinions of other United States Courts of Appeals and opinions of this Court which interpret the Boiler Inspection Act. Further, the Fourth Circuit's holding in this case excludes from coverage the very employee that the Boiler Inspection Act seeks to protect, a locomotive engineer. As such the Fourth

Circuit's rulings in this case raise a question of federal law which should be settled by this Court.

When the Boiler Inspection Act was enacted, its stated purpose was:

> To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto. (emphasis added)

Employees were defined as:

> ...persons actually engaged in or connected with the movement of any train. (emphasis added)

Further, the Act provided that:

> ...it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive in moving interstate or foreign traffic...unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such

> carrier in moving traffic without unnecessary peril to life or limb... (emphasis added)

February 17, 1911, ch. 103, 36 Stat. 913.

By this language Congress intended to protect locomotive engineers like Maynard who are engaged in or connected with the movement of engines and trains for Norfolk and Western.

This Court has recognized that Congress intended for the Boiler Inspection Act to protect employees who may be injured by defective engines which are placed in active service by the railroad. In Brady v. Terminal R.R. Assn., 303 U.S. 10 (1938), this Court ruled that an engine temporarily placed on a receiving track away from a place of repair was "in use" for purposes of the Safety Appliance Act, despite the fact that the employee was injured while he was inspecting a car. This Court stated:

> As we said in Louisville and Nashville R. Co. v. Layton, supra, the liability 'springs from its being made unlawful to use cars not equiped as required, - not from the position the employee may be in, or the work which he may be doing at the moment when he was injured...

Brady, 303 U.S. at 16.

Although the Brady decision dealt with application of the Safety Appliance Act, cases defining and interpreting the phrase "in use" for purposes of the Safety Appliance Act are authoritative for the same purpose under the Boiler Inspection Act. See Lyle v. Atchison, Topeka, & Santa Fe Ry. Co., 177 F.2d 221 (7th Cir. 1949), cert. denied, 339 U.S. 913 (1950).

This Court refused to focus on the actions of railroad employees to deny them coverage under the Safety Appliance Act. This decision reiterates the fact

that the Safety Appliance Act and the Boiler Inspection Act were meant to protect employees of the railroads. Liability under the Boiler Inspection Act "springs" from the fact that a railroad and its employees have put a piece of equipment in active service and not from the activity of the employee who is injured while using that defective equipment.

The Fourth Circuit's decision in Angell delineated at what point an engine is put "in use" for purposes of the Boiler Inspection Act. Kenneth Angell was a machinist who was injured when he was uncoupling two engines. The air brake valve on the engine was defective and when Angell turned the valve a blast of high pressure air injured his right ear. Earlier that day, the engine had

been sanded, fueled and inspected by mechanical department employees. When Angell was injured, all servicing, maintenance and inspection work had been completed at the repair facility. The locomotive was not moving at the time Angell was injured. He was helping to prepare it to be moved to a nearby track to pull a train a few hours later.

The Fourth Circuit's decision focused on whether Angell's engine was "in use" or was being "permitted to be used" on the railroad's line for purposes of coverage by the Boiler Inspection Act. The Fourth Circuit held that although "Congressional intent and case law construing the statute clearly exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment <u>located at a</u>

maintenance facility...," Angell's injuries warranted coverage by the Boiler Inspection Act because his accident occurred "after these excluded activities had been performed and during the uncoupling of a "readied" engine..." Angell, 618 F.2d at 262. (emphasis added)

Although Angell's employer tried to argue that railroad officials did not consider that the engine was "in use" until it was "okayed" by the mechanical department and a crew had been "called", the Fourth Circuit warned against excluding "those activities occurring between servicing and preparing the engine up until the time the engineer takes the controls."

Angell, 618 F.2d at 262.

By excluding only those employees who performed inspections, repairs, and

servicing at a maintenance facility from coverage by the Act, the Fourth Circuit in Angell upheld Congress' stated intention to protect railroad engineers like James Mayanrd who were "engaged in or connected with the movement of any train."

On November 1, 1990, Maynard had been called and assigned by railroad officials to operate engine 3218 to pull other engines and empty hopper cars over a mountain so that that train could deliver the cars to a mine in Wyatt, West Virginia. Maynard was attempting to open the door to start his engine when he was injured. He was not servicing or inspecting the door. Rather, he was performing an act which was necessary for him to move the train and perform his assigned duties.

Maynard's engine had already been placed in active service because it had been inspected, serviced and repaired in Bluefield, West Virginia or Roanoke, Virginia and delivered to Richlands, Virginia before Maynard's injury. Another engineer, Ben Burnette had already used the engine on the day before Maynard's accident.

The Fourth Circuit's rulings exclude Maynard from the protection which Congress intended. The Fourth Circuit has now redefined when an engine is put in use or is being permitted to be used by a railroad on its line for purposes of the Boiler Inspection Act. The rationale utilized is that Maynard had not inspected the engine and had not completed an inspection report before he was injured. This ruling contravenes the

intent of the Act to include, rather than exclude, railroad employees from coverage.

The Fourth Circuit cited Pinkham v. Maine Central R. R. Co., 874 F.2d 875 (1st Cir. 1989) as authority for its opinion that the Boiler Inspection Act had not yet become applicable to Maynard because he had not placed his engine in use by completing his inspection. Edward Pinkham was an employee hired by Maine Central to perform electrical maintenance on locomotives. Pinkham was injured while he was working on an engine which was undergoing testing and which was located at a repair facility in Portland, Maine. The First Circuit ruled that Pinkham's engine was not "in use" when he was injured because "locomotives being serviced in a place of repair are not 'in

use' within the meaning of the Boiler Inspection Act." Pinkham, 874 F.2d at 881-882. The First Circuit cited cases, including Estes v. Southern Pacific Transp. Co., 598 F.2d 1195 (10th Cir. 1979) and Angell as supporting authority.

Pinkham and Angell stand for the proposition that activities including inspection, repair and servicing of locomotives or engines at maintenance facilities are excluded from coverage by the Boiler Inspection Act. The exclusion which is provided for in these decisions should be read narrowly as the Boiler Inspection Act intends that engineers like Maynard be protected once their engines are released from a maintenance facility and placed into active service by the railroads.

The Fourth Circuit also cited

Trinidad v. Southern Pacific Transportation Co., 949 F.2d 187 (5th Cir. 1991), as authority for its opinion that Boiler Inspection Act coverage had not yet become applicable to Maynard. Trinidad was a carman who was injured after he had discovered and repaired an air leak in the brake system of a tank car.

The Fifth Circuit ruled that the inspection of the brake system was technically not complete because Trinidad had not reported his findings to the engineer and as such the train was not "in use" when Trinidad was injured. Trinidad, 949 F.2d at 189.

The Trinidad decision is not proper authority for this case. Maynard was an engineer specifically afforded protection by the Boiler Inspection Act because he

was an employee who had been called by his supervisors to assist the movement of a coal train so that it could deliver empty coal cars to a coal mine. He was engaged in an activity directly related to moving that train when he was injured.

Maynard had a duty to perform a general inspection of his engine but this was incidental to his operation of the engine. In fact, he was required to turn in his inspection report after his run and not before. When Maynard attempted to enter the engine door, he intended on starting his engine and leaving Richlands. The engine was already in use when Maynard boarded the engine. He was under no obligation to report the condition of the engine until.

The District Court and the Fourth Circuit have ignored Maynard's testimony

and have chosen to accept Norfolk and Western's claim that Maynard had to report the condition of his engine before leaving Richlands. The District Court and the Fourth Circuit have found that because this inspection was not completed when Maynard was injured, the engine had not been put "in use".

The District Court and the Fourth Circuit have also ignored the testimony of Ben Burnette. Burnette testified that he operated the engine the day before Maynard's accident and could not open the door. Burnette testified that he reported the condition of the door in his inspection report which was turned in <u>after</u> his run. The Boiler Inspection Act violation which ultimately caused Maynard's injury existed the day before Maynard's injury and the engine was

allowed to remain in use until Maynard was injured.

It is clear from Maynard's and Burnette's testimony that their duty to perform a general inspection of their engines had no bearing on whether their engine was "ready" or "in use." As such, the Trinidad case has no application to the facts in this case.

The Fourth Circuit also relied upon the fact that Maynard's engine was dormant and had not been connected to any cars when he was injured. However, this Court has ruled that a car is "in use" despite the fact that it is motionless. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Goneau, 269 U.S. 406, 409 (1926), and the Second Circuit in Holfester v. Long Island Railroad Co., 360 F.2d 369 (2nd Cir. 1966), held that

an engine which is temporarily removed from a main line away from a place of repair remains "in use" for purposes of the Boiler Inspection Act. The Second Circuit relied on this Court's decisions in Brady and Goneau in giving a broad application of the Act. Holfester, 360 F.2d at 372, 373.

These decisions show that Congress intended to protect employees engaged in moving engines and cars once those pieces of equipment were placed in service. Congress and this Court have recognized that employees may be injured by defective equipment despite the fact that it is standing still. Again, liability under the Act springs from the fact that the railroad places defective equipment in service.

The Fourth Circuit's reliance on

Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir. 1979), for the requirement that an engine must be moving or moving interstate or foreign commerce to be "in use" is inappropriate. Angell declined to rely upon Estes because the question of whether an engine was moving interstate or foreign commerce when an employee was injured was not dispositive of the question as to when an engine had been "readied" and "okayed" for active service by a railroad. See Angell, 618 F.2d at 262. Estes more accurately stands for the same proposition that Angell stands for, that is, that an engine which has not been released from a servicing facility is not "readied" and "okayed" for service by a railroad.

Estes was injured when he was

boarding an engine which was housed in a round house area on a track which was used for servicing. There was no evidence that the engine had been released from that facility for active service. Again, the focus of the Tenth Circuit's analysis was whether the engine had been released from a repair facility so that engine could be considered "in use". This analysis keeps with Congress' intent to protect the employee once the engine is placed in use.

The need for this Court to review the Fourth Circuit's decision is shown by a recent decision of the United States District Court for Colorado. In Rivera v. Union Pacific R. Co., 868 F.Supp. 294 (D. Colo. 1994), Rivera was an engineer who slipped and fell on an automatic brake valve handle as he walked through

an engine cab after he had looked at the control panel to ensure that the hand brakes were released and the engines were in a "run" position. Rivera's employer argued that the engine was not in use because he was performing an "inspection" and because the engine was not moving interstate or foreign commerce at the time Rivera was injured.

The District Court in Rivera ruled that Rivera's engine was in use because Estes and this Court's decision in Goneau did not require that an engine be moving or engaged in moving interstate a foreign commence to be in use for purposes of the Boiler Inspection Act. Rivera 868 F. Supp. at 300.

The District Court in Rivera also found, in accordance with Angell, that Rivera's engine had been readied for use

because it had been released from a maintenance facility and because his act of looking at the panel was not an act of inspection to discover defects but an act incident to his task of operating the train. Rivera 868 F.Supp. at 300. This is exactly the same situation posited by the instant case.

If the Fourth Circuit's ruling in this case is allowed to stand, engineers like Rivera and Maynard will have no protection under the Boiler Inspection Act unless an engine is moving along a mainline.

The Fourth Circuit's decision in this case conflicts with its previous decision in Angell and conflicts with the rulings of this Court and those of other United States Courts of Appeals which properly apply the Boiler Inspection Act.

The Fourth Circuit's opinion in this case excludes from coverage the very employee that the Act seeks to protect, a locomotive engineer who was engaged in moving his engine.

CONCLUSION

The evidence which was presented to the District Court and the Fourth Circuit on motion and during the trial of this case showed that James B. Maynard was injured on an engine which had been inspected, serviced, and repaired at a maintenance facility or "readied"; released by Norfolk and Western's officials for active service; and delivered Norfolk and Western's yard in Richlands, Virginia for use by employees engaged in or connected with the movement of that engine.

Given the Fourth Circuit's ruling in

Angell, and further, given decisions rendered by this Court and those of other United States Courts of Appeal, Norfolk and Western engine 3218 was "in use" or was being "permitted to be used on its line" for purposes of the Boiler Inspection Act. James B. Maynard should be afforded the coverage that Congress intended in enacting the Boiler Inspection Act.

The Fourth Circuit's opinion in this case conflicts with its previous decision in Angell and conflicts with decisions of this Court and other United States Courts of Appeal on this important question of federal law. Accordingly, James B. Maynard's Petition for Writ of Certiorari should be granted and ultimately the rulings of the District Court and the Fourth Circuit with respect to his Boiler

Inspection Act claim should be reversed and a new trail should be ordered.

Respectfully submitted,

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